IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM MUNDY	:	CIVIL ACTION
v.	:	
PHILADELPHIA SHERIFF DEPARTMENT, et al.	:	NO. 96-7925

O'Neill, J. July , 1997

MEMORANDUM

Before the Court is plaintiff's motion to reopen the time for appeal pursuant to Fed.R.App.P. 4(a)(6).

Plaintiff filed a pro se motion to proceed in forma pauperis in this 42 U.S.C. § 1983 action. I denied that motion by Order dated December 11, 1996. Plaintiff represents that he first received notice of that Order on February 22, 1997 when he called the district court for a status update. He claims he did not receive a copy of the Order or any other written notice until March 14, 1997 because state authorities were transferring him from one correctional institution to another.[1] On March 17, 1996 plaintiff mailed a filing captioned "notice of appeal."[2]

In this filing plaintiff recognized that his appeal was not timely and requested that the Court allow his appeal to proceed despite the delay. He stated that his appeal was untimely through no fault of his own because he did not receive notice of the December 11, 1996 Order until March 14, 1997.

On April 1, 1997 the Office of Staff Attorneys for the Court of Appeals sent plaintiff a notice that his appeal would be submitted to a panel of the Court of Appeals for possible dismissal because

[1] I accept plaintiff's representations because plaintiff certified that the statements were true and his explanation that he did not receive notification because he was in the midst of a transfer is plausible. Defendants also do not contend that plaintiff's representations are inaccurate or present any evidence that contradicts the representations.

[2] Plaintiff's certificate of service attached to the notice of appeal showed that he mailed the notice of appeal on March 17, 1997. This fact is significant because "if an inmate confined to an institution files a notice of appeal . . . the notice of appeal is timely if it is deposited in the institution's internal mail system on or before the last day of filing." Fed.R.App.P. 4(c). See also United States v. Grana, 864 F.2d 312, 315 (3d Cir. 1989) ("notices of appeal are deemed filed at the moment of delivery to prison authorities for forwarding to the district court.")

he failed to timely appeal. This notice also explained that the district court has authority to reopen the time for appeal pursuant to Rule 4(a)(6). Plaintiff mailed a motion to reopen the time for appeal on April 5, 1997.[3]

Normally a notice of appeal "must be filed with the clerk of the district court within 30 days after the date of entry of the judgment." Fed.R.App.P. 4(a)(1). Rule 4, however, provides an exception where a party does not receive timely notice of a judgment. The exception provides:

> The district court, if it finds (a) that a party entitled to notice of entry of judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of judgment or order or within 7 days of receipt of notice, whichever is earlier, reopen the time for appeal . . . .

Fed.R.App.P. 4(a)(6). Defendants contend that plaintiff's motion to reopen the time for appeal is untimely because he failed to file the motion within seven days of February 22, 1997 when he received oral notification of the December 11, 1996 Order from the district court clerk.[4]

Defendants' argument assumes that oral notice satisfies the Rule's notification requirement. The Rule itself does not specify whether written notice is required. Two Courts of Appeals have held that oral notification is insufficient to trigger Rule 4(a)(6)'s time limits. See Scott-Harris v. City of Fall River, 1997 WL 9102, *5-6 (1st Cir.) ("[W]e hold that written notice is required to trigger the relevant time period under Rule 4(a)(6); oral communications or other forms of actual notice will not serve."), cert. granted sub nom., Bogan v. Scott-Harris, --- U.S. ---, 1997 WL 18101 (1997); Avolio v. County of Suffolk, 29 F.3d 50, 53 (2d Cir. 1994) ("[T]he notice contemplated by this rule is written notice; an oral communication simply is not sufficient to trigger the relevant time

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[3] I have jurisdiction to decide plaintiff's motion despite his filing a notice of appeal, see Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 379 (1985) (filing of notice of appeal generally divests a district court of jurisdiction over a case), because a district court retains jurisdiction over matters in aid of the appeal even after the filing of a notice of appeal. United States v. Lafko, 520 F.2d 622, 627 (3d Cir. 1975); see also Consolidated Freightways Corp. of Delaware v. Larson, 827 F.2d 916, 918 (3d Cir. 1987) (discussing district court's ruling on motion to extend time in which to file notice of appeal after filing of notice). "[R]uling on the timing of an appeal is surely a matter in aid of that appeal." Cossaboon v. Super, 1993 WL 79059, *1 (D.N.J. 1993).

[4] Defendants do not contend that plaintiff failed to meet the other requirements of Rule 4(a)(6).

periods.").[5] I agree that the notice contemplated by Rule 4(a)(6) is written notice and I adopt the rationale of the First Circuit Court of Appeals. See Scott-Harris, 1997 WL 9102, *5-6.

Plaintiff first received written notice on March 14, 1997 and filed a motion to reopen the time for appeal on April 5, 1997. Plaintiff's April 5th motion was not filed within the seven day period and therefore does not provide the proper basis for reopening the time for appeal pursuant to Rule 4(a)(6).[6] Plaintiff, however, filed the motion captioned "notice of appeal" within the seven day period. I must therefore decide whether to construe this filing as a motion to reopen the time for appeal.

The Court of Appeals for the Third Circuit has not decided whether a district court may construe a notice of appeal as a Rule 4(a)(6) motion to reopen the time for appeal, but has refused to construe a notice of appeal as a Rule 4(a)(5) motion reasoning that Rule 4(a)(5) expressly requires the filing of a motion. Herman v. Guardian Life Ins. Co., 762 F.2d 288, 289-90 (3d Cir. 1985). While Rule 4(a)(6), like Rule 4(a)(5), also expressly requires a motion,[7] two facts distinguish this case from Herman -- plaintiff's pro se status and his acknowledgment of the untimeliness of his appeal.

While plaintiff's pro se status "does not excuse him from complying with procedural rules," Devon v. Vaughn, 1995 WL 295431, *2 (E.D. Pa. 1995), it does afford him "greater leeway where [he has] not followed the technical rules of pleading and procedure." Tabron v. Grace, 6 F.3d 147,

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[5] See also Cote v. Chase, 914 F. Supp. 739, 741-42 (D.N.H. 1996) ("Receipt of written notice . . . appears to be required.") But see Benavides v. Bureau of Prisons, 79 F.3d 1211, 1214-15 (D.C. Cir. 1996) (holding in dictum that oral notification by clerk or party triggers the seven day period); Nunley v. City of Los Angeles, 52 F.3d 792, 794 (9th Cir. 1995) (party "claims to have received actual notice" when attorney inspected docket and saw entry of order denying motion for JNOV or new trial).

[6] The requirements of Rule 4(a)(6) are "mandatory and jurisdictional." Marcangelo v. Boardwalk Regency, 47 F.3d 88, 91 (3d Cir. 1995).

[7] The Advisory Committee's Notes also state that "[r]eopening may be ordered only upon a motion filed . . . within 7 days of receipt of notice of such entry . . . ." See also Marcangelo, 47 F.3d at 90 (holding that "[t]he careful balancing of interests revealed by the text [of Rule 4(a)(6)] and the Committee Note is a compelling reason for adherence to the language of the rule.")

153 n.2 (3d Cir. 1993).[8] The leeway to which plaintiff is entitled is particularly expansive in the captioning of motions because the function of the motion, not its caption, controls. See Perez v. Cucci, 932 F.2d 1058, 1061-62 n.10 (3d Cir. 1991); Union Switch & Signal v. United Elec., Radio and Mach. Workers, 900 F.2d 608, 614 (3d Cir. 1990); Lewis, 878 F.2d at 722 n.20 ("A pleading will be judged by its substance rather than according to its form or label.") I must therefore examine the function and substance of the filing captioned "notice of appeal."

In his filing plaintiff recognized that his attempt to appeal was untimely and asserted that it was untimely because he had not received notice of the December 11, 1996 Order until March 14, 1997. He requested "that this appeal be allowed" because he was not the "cause [of the] delay in perfecting appeal." The function of the motion is a request to proceed with his appeal despite its untimeliness, and the relief sought is available only through a Rule 4(a)(6) motion.[9] In light of plaintiff's pro se status and his explicit request for relief provided for only in Rule 4(a)(6), I find Herman distinguishable and construe plaintiff's filing as a Rule 4(a)(6) motion and not merely a notice of appeal.[10] Plaintiff's filing therefore satisfied the requirements of Rule 4(a)(6).

Having concluded that I am authorized under Rule 4(a)(6) to reopen the time for appeal, I must decide whether to do so. Because I find that plaintiff diligently pursued his appellate rights

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[8] See also Lewis v. Attorney Gen. of the U.S., 878 F.2d 714, 722 n.20 (3d Cir. 1989) (technical deficiencies in a pro se litigant's pleadings will be treated leniently); Smith v. Lindenmeyer Paper Co., 1997 WL 312077, *2 (E.D. Pa. 1997) ("The Court recognizes its obligations to construe liberally pro se submissions to ensure that rules of pleadings and motion do not subvert a litigant's opportunity for a judicial remedy.")

[9] The Court of Appeals lacks jurisdiction to hear appeals out of time unless the district court grants an extension pursuant to Rule 4(a)(5) or reopens the time for appeal pursuant to Rule 4(a)(6). Marcangelo, 47 F.3d at 90-91; see also Cruz v. Melendez, 902 F.2d 232, 235 (3d Cir. 1990). An extension of time pursuant to Rule 4(a)(5) may be granted only "upon motion filed not later than 30 days after the expiration of time prescribed by this Rule 4(a)." It is undisputed that plaintiff did not file his "notice of appeal" within that time. Therefore, plaintiff may proceed, if at all, only under Rule 4(a)(6).

[10] See also Sanders v. United States, 113 F.3d 184 (11th Cir. 1997) (construing late notice of appeal as a Rule 4(a)(6) motion where a pro se litigant did not receive notice of the entry of an order or judgment); United States v. Dodds, 1994 WL 673056, *1 (10th Cir. 1994) ("Because defendant recognized that he had a timeliness problem, we liberally construe Defendant's [pro se] notice of appeal as a motion to reopen the time for appeal."), cert. denied, 116 S.Ct. 1032 (1996); Powless v. Grose, 1996 WL 421195, *1 (N.D.N.Y. 1996) (applying Court of Appeals' instruction to construe pro se plaintiff's notice of appeal as a motion to reopen the time for appeal); cf Jenkins v. Burtzloff, 69 F.3d 460, 462-63 (10th Cir. 1995) (notice of appeal cannot be treated as motion for extension of time "where a request for additional time is not manifest."). Neither the Court nor the parties has identified any case refusing to construe a notice of appeal as a Rule 4(a)(6) motion where a pro se plaintiff filed a notice of appeal within the Rule 4(a)(6) time limits which recognized the untimeliness of the appeal.

once he received written notice and was not the cause of the delay, I conclude that I should use my authority and reopen the time for appeal.

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O R D E R

AND NOW this day of July, 1997 upon consideration of plaintiff's motion to reopen the time for appeal and the parties' filings related thereto, it is hereby ORDERED that plaintiff's motion is GRANTED.

THOMAS N. O'NEILL, JR., J.